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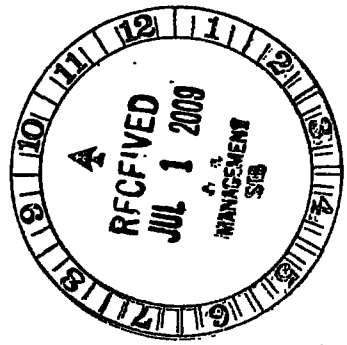

BY HAND

The Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: Docket No. 42113 (Sub-No. 1), Arizona Electric Power Cooperative, Inc. v. Union Pacific Railroad Company

Dear Secretary Quinlan:

On behalf of Union Pacific Railroad Company ("UP"), and in connection with the above-referenced docket, I have enclosed a copy of the U.S. District Court for the District of Arizona's recent Order denying in part and granting in part the motion filed by Arizona Electric Power Cooperative, Inc. ("AEPCO") to dismiss UP's complaint for declaratory relief. UP is providing a copy of the Order to keep the Board informed about the status of proceedings before the Court.

In sum, the Court denied AEPCO's motion to dismiss UP's claims that UP and AEPCO entered into a transportation services contract and that AEPCO has an obligation to negotiate with UP in good faith. The Court granted AEPCO's motion to dismiss UP's request for a declaration that UP had no obligation to establish common carrier rates for the transportation of coal from mines in Colorado and the Southern Powder River Basin to AEPCO's Apache Station, but it noted that the Board would likely hold related administrative proceedings in abeyance until it reached a final determination regarding the contract issue.

Thank you for your attention to this matter.

Sincerely,

Michael L. Rosenthal

Enclosure

cc: Counsel for Complainant Arizona Electric Power Cooperative, Inc.
Counsel for Defendant BNSF Railway Company

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Union Pacific Railroad Company, Plaintiff, vs. Arizona Electric Power Cooperative, Inc., Defendant.	No. CV 09-45-TUC-FRZ **ORDER**

Pending before the Court is Defendant's motion to dismiss. For the reasons stated below, the motion is denied in part and granted in part.[1]

Standard of Review

The dispositive issue raised by a motion to dismiss for failure to state a claim is whether the facts as pleaded, if established, support a valid claim for relief. *See Neitzke v. Williams*, 490 U.S. 319, 328-329 (1989). In reviewing a motion to dismiss for failure to state a claim, a court's review is typically limited to the contents of the complaint. *See Clegg v. Cult Awareness Network*, 18 F.3d 752, 754 (9th Cir. 1994). "[The Court must] construe the complaint . . . in the light most favorable to the non-moving party, and [the Court must] take the allegations and reasonable inferences as true." *Walter v. Drayson*, 538 F.3d 1244, 1247 (9th Cir. 2008); *Clegg*, 18 F.3d at 754; *see also Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955,

[1]The Court has determined that the issues have been fully and adequately briefed and that oral argument would not aid the Court in its understanding of the issues.

1964-65 (2007)("While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do . . . Factual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all allegations in the complaint are true (even if doubtful in fact) . . . of course, a . . . complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.")(internal quotes and citations omitted).[2]

Background

Union Pacific Railroad Company ("UP") has initiated this action primarily seeking a judicial declaration that a railroad transportation contract exists between UP and Arizona Electric Power Cooperative ("AEPCO"). UP alleges that UP and AEPCO entered into a contract that establishes rates and terms for transporting coal from UP served mines in Colorado and the Southern Powder River Basin ("SPRB") of Wyoming to AEPCO's electric generation facility in Cochise, Arizona which is called Apache Station; the period of the contract allegedly began on 1/1/09. Taking UP's facts as true and drawing all reasonable inferences in UP's favor, the background and allegations surrounding UP's claims are reflected below.

Under federal law, a railroad is required to establish common carrier rates for transporting coal unless those rates are already governed by a transportation services contract. The federal Surface Transportation Board ("STB") regulates common carrier rates and service

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[2]The Court notes that AEPCO's motion to dismiss and related reply brief attach documents for the Court's consideration that are not attached to UP's Complaint; these documents are primarily correspondence and related documents that are referenced in the Complaint pertaining to the alleged formation of a contract. *See generally Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994)(overruled on other grounds in *Galbraith v. County of Santa*, 307 F.3d 1119, 1127 (9th Cir. 2002)(documents not physically attached to a complaint may be considered by the court on a motion to dismiss without converting it to a motion for summary judgment if the complaint refers to such documents, the documents are central to plaintiff's claim and no party questions the authenticity of the attached documents); *Knievel v. ESPN*, 393 F.3d 1068, 1076-77 (9th Cir. 2005).

terms. However, rates and terms governed by contracts are not subject to STB regulation; rather, courts have jurisdiction over contractual disputes. In 2003, AEPCO and UP settled a dispute whereby AEPCO asked the STB to set maximum common carrier rates for transporting coal from mines in Colorado and the SPRB to Apache Station; the dispute was settled as UP and AEPCO entered into a contract in the form of a Term Sheet dated 2/3/03 ("Term Sheet"). UP and AEPCO intended to incorporate the Term Sheet into a more formalized document, but they never did so and simply operated under the Term Sheet until it expired on 12/31/08. On 4/2/08, UP provided AEPCO with a Confidential Proposal for a new contract to govern the transportation of coal from Colorado and the SPRB to Apache Station beginning on 1/1/09; the Confidential Proposal covered the same basic transportation terms as the Term Sheet and set forth the material terms that are essential to establish and implement a rail transportation services contract. The Confidential Proposal stated that it would expire on 5/4/08 unless the terms were accepted by AEPCO by that date. The Confidential Proposal also stated that the proposed terms, if agreed to by the parties, would be binding on both parties and would be incorporated into a more formalized transportation services agreement, which would contain additional, but not conflicting terms, and which UP would prepare upon receipt of AEPCO's written assent to the terms of the Confidential Proposal.

In a 6/4/08 letter from AEPCO to UP, AEPCO's Senior Vice President and Chief Operating Officer stated that AEPCO "accepts [UP's] transportation proposal" and '[w]e look forward to working with you to develop a transportation service agreement." Attached to this letter was a copy of the Confidential Proposal that had been signed by AEPCO's Senior Vice President and Chief Operating Officer. The letter and signed Confidential Proposal were transmitted via email on 6/5/08. In response to AEPCO's letter and signed copy of the Confidential Proposal, UP prepared a draft document that incorporated the terms in the Confidential Proposal in a more formalized transportation services agreement ("Formalized Agreement"); the Formalized Agreement contained additional terms that were not originally contained in the Confidential Proposal and the Formalized Agreement had not

been signed by UP's representatives. UP provided the Formalized Agreement to AEPCO; the Formalized Agreement was transmitted as a reply to AEPCO's 6/5/08 email.

On 9/22/08, AEPCO's corporate counsel sent a letter to UP requesting that UP establish common carrier rates for transporting coal from mines in Colorado and the SPRB to Apache Station beginning 1/1/09. On 10/10/08, UP responded to the letter stating that it would not establish the requested common carrier rates because UP and AEPCO entered into a contract that covered the transportation of coal from mines in Colorado and the SPRB to Apache Station beginning 1/1/09. On 10/29/08, AEPCO responded to UP's letter; AEPCO's Corporate Counsel denied that the parties entered into any contract regarding transportation services after 12/31/08 and he repeated AEPCO's request that UP establish common carrier rates.

Based on these allegations, UP filed a three-count declaratory relief Complaint. In Count 1, UP seeks a declaration that UP and AEPCO entered into a contract for the transportation of coal. In Count 2, UP seeks a declaration that it is under no obligation to establish common carrier rates for the transportation of coal in light of the fact that UP and AEPCO already entered into a contract which governs the transportation of coal in question. In Count 3, "in the alternative," UP seeks a declaration that AEPCO is obligated to negotiate in good faith towards finalizing the transportation services contract.

Discussion

Count 1: Existence of a Transportation Services Contract between UP and AEPCO

A review of the briefs demonstrates that the decisive issue before the Court is whether UP validly accepted a counteroffer from AEPCO for purposes of forming a valid contract under Arizona law. As a threshold matter, the offer and acceptance issues are initially somewhat backwards as it is UP that actually made an offer to enter into a contract via the 4/2/08 Confidential Proposal. However, according to its own terms, the Confidential Proposal expired on 5/4/08. It was not until 6/5/08 that AEPCO sent a letter back to UP attempting to accept the Confidential Proposal whereby an executive of AEPCO signed off on the Confidential Proposal in question.

As AEPCO attempted to accept UP's offer by signing off on the Confidential Proposal after the offer expired on 5/4/08, the attempted acceptance by AEPCO is ineffective and the attempted acceptance can legally be considered as AEPCO's counteroffer to UP to accept the terms of the Confidential Proposal; a review of the briefs shows that this issue is essentially undisputed and the Court will not belabor this issue. *See* 1 Joseph M. Perillo, *Corbin on Contracts* §3.20 (Rev. ed. 1993)(hereinafter referred to as "*Corbin on Contracts*")("If a definite time is fixed for acceptance, the offeree knows when a purported acceptance is later than the time specified and whether the power of acceptance has expired. In such a case, there seems to be no reason to give a belated attempt any effect other than that of a counter-offer."); 2 Richard A. Lord, *Williston on Contracts* §6:56 (4th ed. 2007)(hereinafter referred to as "*Williston on Contracts*")("[A] defective acceptance can only amount to a counteroffer, and a contract can be formed only by acceptance of the counteroffer in the same way as if it were an original offer."). Thus, the primary issue before the Court is whether UP's response to AEPCO's counteroffer (i.e., drafting and sending AEPCO the Formalized Agreement) functioned as a valid acceptance under the circumstances of this case. *See id.*; *see also Corbin on Contracts* §3.35 ("If the party who made the prior offer properly expresses assent to the terms of the counter-offer, a contract is thereby made on those terms. The fact that the prior offer became inoperative is now immaterial, and the terms of that offer are also immaterial except in so far as they are incorporated by reference in the counter-offer itself. Very frequently, they must be adverted to in order to determine what the counter-offer is."); *Corbin on Contracts* §3.36 ("A counter-offer is, of course, an offer, and subject to the rules that concern the acceptance of offers."); Restatement (Second) of Contracts §70 ("A late or otherwise defective acceptance may be effective as an offer to the original offeror . . . ").

AEPCO argues that UP did not validly accept any counteroffer regarding the Confidential Proposal under the circumstances at bar as UP did not unambiguously accept the counteroffer and added material terms in their purported acceptance via the Formalized Agreement which therefore undermined any valid acceptance. AEPCO argues that the Formalized Agreement

was not an objectively clear and definite expression of acceptance as required by Arizona law. *See Autonumerics, Inc. v. Bayer Industries, Inc.*, 144 Ariz. 181, 186 n.2 (Ct. App. 1984)(quoting Arizona's statutory version of the Uniform Commercial Code, ARS §47-2207, which requires a "definite and seasonable expression of acceptance"); *Clark v. Compania Ganadera de Cananea*, 94 Ariz.391, 400 (1963)(stating that "the acceptance of the offer must be unequivocal" and that the words "hereby accepted" qualified as an unequivocal acceptance in that case); *Hill-Shafer Partnership v. Chilson Family Trust*, 165 Ariz. 469, 474 (1990)(there must be objective evidence of mutual assent; hidden intent as to mutual assent is insufficient); *Gifford v. Makaus*, 112 Ariz. 232, 236 (1975)(same).[3] AEPCO argues that the Formalized Agreement is the only document that could serve as a potential acceptance in this case, and that the Formalized Agreement was not an unambiguous acceptance. AEPCO argues that the Formalized Agreement was transmitted under a cover letter that said nothing about an acceptance and the Formalized Agreement does not contain any language reflecting a definite expression of acceptance which means there was no actual acceptance in this case.

AEPCO also argues that even if there was a definite expression of acceptance, UP's Formalized Agreement added additional terms (which were material) that were not contained in the counteroffer (i.e., the Confidential Proposal) which undermines any purported acceptance by UP. *See United California Bank v. Prudential Ins. Co. of America*, 140 Ariz. 238, 270-71 (Ct. App. 1983)("The conditions to the commitment letter contained materially different terms than those attached to the loan application. Under general contract principles,

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[3]Citing *Taylor v. State Farm Mutual Insurance Automobile Company*, 175 Ariz. 148, 158 (1993), AEPCO also notes that "UP and AEPCO must be considered as 'sophisticated parties' who are expected to know and observe the rudiments of the law of contracts, including the basic requirement that to form a contract there must be a definite expression of acceptance of an offer." *See* Reply Brief at 4. In *Taylor*, in the context of a tort-based insurance bad faith case, the court stated: "Surely, State Farm knew what language would effectively release it from Taylor's potential bad faith claim. It can be inferred that sophisticated parties in the business of settling insurance claims, faced with the task of releasing a claim as large as Taylor's, would have used more specific or at least broader language if that was their agreement." *See Taylor*, 175 Ariz. at 158.

the commitment letter must be viewed as a counter-offer . . . The common law rules require that the acceptance [of an offer] be on virtually the exact terms as the offer, and any attempt to accept on terms materially different from the original offer constitutes a counter-offer, which rejects the offer. A counter-offer can become the basis of a contract if it is accepted by the person who made the original offer.")(quoting from F. Slavin & D. Burton, *Arizona Construction Law*, 4 (3d ed. 1982)). AEPCO argues that the Formalized Agreement contained at least two material changes (i.e., a termination term and a service term) that varied from the offer reflected in the Confidential Proposal. AEPCO argues that UP added a material termination clause which stated that if AEPCO failed to ship coal for 90 consecutive days, UP could terminate the contract with 20 days advance notice; AEPCO argues that it would never agree to such a provision as it added burdensome obligations. AEPCO also argues that UP inserted a material provision which changed the rendition of coal transportation service from simply "reasonable dispatch"[4] (as reflected in the Confidential Proposal) to a lengthy, self-serving definition of service which essentially excuses UP's rendition of bad services for a litany of reasons which are largely within UP's control such as excessive demand and track maintenance. AEPCO stresses that it never would have agreed to the termination and service clauses at issue as they completely alter the balance of the bargain in favor of UP. In light of the addition of these two provisions, AEPCO argues that the Formalized Agreement was not a valid acceptance.

In response, UP argues that there was a proper expression of acceptance under the specific circumstances of this case. Furthermore, UP argues that the additional terms (i.e., terms not reflected in the counteroffer/Confidential Proposal) at issue did not invalidate UP's acceptance as the additional terms were merely requests for additions to the offer and UP's acceptance was not conditioned on AEPCO assenting to the additional terms. Taking UP's

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[4]AEPCO argues that "reasonable dispatch" is a known, established and well-defined term in the industry and it would have been comfortable purchasing UP's services under the reasonable dispatch standard.

allegations as true and drawing all reasonable inferences in UP's favor, UP has stated valid claims for relief and the Court must therefore deny AEPCO's motion to dismiss.

As UP correctly argues, AEPCO's attempted acceptance of UP's Confidential Proposal was itself a new offer (a counteroffer is an offer) as the attempted acceptance was "'a manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.' Restatement Second of Contracts §24 . . . The offer creates a power of acceptance permitting the offeree by accepting the offer to transform the offer as promised into a contractual obligation" *K-Line Builders, Inc. v. First Fed. Sav. & Loan Assn.*, 139 Ariz. 209, 212 (Ct. App. 1983); *see also Corbin on Contracts* §3.35 ("If the party who made the prior offer properly expresses assent to the terms of the counter-offer, a contract is thereby made on those terms. The fact that the prior offer became inoperative is now immaterial, and the terms of that offer are also immaterial except in so far as they are incorporated by reference in the counter-offer itself. Very frequently, they must be adverted to in order to determine what the counter-offer is.") *Corbin on Contracts* §3.36 ("A counter-offer is, of course, an offer, and subject to the rules that concern the acceptance of offers."); Restatement (Second) of Contracts §70 ("A late or otherwise defective acceptance may be effective as an offer to the original offeror . . . "); Restatement (Second) of Contracts §70 cmt. b ("A late acceptance may be an offer which can be accepted by the original offeror . . ."). In its attempted acceptance, AEPCO made clear that it was willing to enter into a contract on the terms reflected in the Confidential Proposal; AEPCO's written letter to UP stated that AEPCO "accepts Union Pacific Railroad's (UP) transportation proposal dated April 2, 2008 [i.e., the Confidential Proposal] . . . We look forward to working with you to develop a transportation service agreement." Along with the letter, AEPCO attached a signed copy of the Confidential Proposal. The last paragraph of the Confidential Proposal stated that the proposed terms, if agreed to by the parties, would be binding on both parties and would be incorporated into a more formalized agreement, which would contain additional, but not conflicting terms, and which UP would prepare upon receipt of AEPCO's assent to the terms of the Confidential Proposal. In response, UP

prepared the Formalized Agreement and transmitted the Formalized Agreement to AEPCO. Taking UP's facts as true and drawing all inferences in UP's favor, the Court finds that UP's actions functioned as a clear expression of acceptance under the circumstances of this case. *See id.*; *see also K-Line Builders, Inc.*, 139 Ariz. at 212 ("An acceptance is 'a manifestation of assent to the terms thereof made by the offeree in manner invited or required by the offer.' Restatement Second of Contracts §50."); *Contempo Construction Co. v. Mountain States Telephone and Telegraph Co.*, 153 Ariz. 279, 281 (Ct. App. 1987)(same); Arizona Revised Arizona Jury Instructions (4th Ed. 2005) ("RAJI"): Contract 6-Acceptance ("An acceptance is an expression of agreement to the terms of the offer by the person to whom the offer was made.").

As to additional terms in the Formalized Agreement that were not contained in the offer/Confidential Proposal, UP argues that in taking its allegations as true and drawing all inferences in its favor, the applicable record reflects that it did not condition its acceptance of AEPCO's offer on AEPCO's assent to any of the additional terms (material or otherwise) in the Formalized Agreement. Rather, UP argues that the Formalized Agreement functioned as a definite expression of acceptance to the terms contained in the Confidential Proposal and the additional terms were simply proposals for changes or additions to be included in a subsequent, more formalized transportation agreement. The Court agrees. UP cites the Restatement (Second) of Contracts §61 to support its position that its acceptance was still valid despite the additional terms at issue. Section 61 states: "An acceptance which requests a change or addition to the terms of the offer is not thereby invalidated unless the acceptance is made to depend on an assent to the changed or added terms." *See also* Restatement (Second) of Contracts §61 cmt. a ("An acceptance must be unequivocal. But the mere inclusion of words requesting a modification of proposed terms does not prevent a purported acceptance from closing the contract unless, if fairly interpreted, the offeree's assent depends on the offeror's further acquiescence in the modification."). UP points out that the circumstances at bar conform to the pattern in §61; for example, UP stresses that the Confidential Proposal stated that its terms would be "binding on both parties," it expressly

contemplated that additional terms would be proposed that would be incorporated into a subsequent, more formalized transportation services agreement, and that the Confidential Proposal stated that the final document would "contain additional, but not conflicting, provisions."

While AEPCO cites Arizona's general common law rules pertaining to clear expressions of acceptance and that adding additional material terms makes a purported acceptance ineffectual,[5] the Court notes that the parties have not cited any Arizona cases either accepting, rejecting, or otherwise discussing §61 and the Court has not found any Arizona cases to that effect. It appears that §61 is applicable under the circumstances of this case, and that §61 is not inconsistent and is otherwise an exception applied by modern courts to the general common law rules discussed in this Order. Thus, an acceptance is still valid even if changes or additions are requested and acceptance is not dependent on assent to the newly proposed terms. For example, in relation to these issues, commentators have stated: "In recent years, though the general rule has remained in effect [i.e. that an acceptance must comply with the terms of the offer and adding new terms to the offer invalidates an attempted acceptance], modern courts have tempered its harshness through a variety of techniques. Some have suggested that additions contained in an acceptance may be merely precatory . . ." *Williston on Contracts* §6:11; *see also Corbin on Contracts* §3.30 ("An expression of acceptance is not prevented from being exact and unconditional by the fact . . . that the offeree makes some simultaneous 'request'"). As to additional terms coupled with a clear expression of acceptance, commentators have recognized that:

> Frequently an offeree, while making a positive acceptance of the offer, also makes a request or suggestion that some addition or modification be made. So long as it is clear that the offeree is positively and unequivocally accepting the offer, regardless of whether the request is granted or not, a contract is formed. Thus, a request for a modification of the offer coupled with an otherwise unqualified acceptance, which does not depend on the offeror's assent to the requested change, operates as an acceptance, and a contract is thereby formed . . . Of course, if the request for additional or changed terms is fairly understood as requiring the offeror's assent, it will operate as a counteroffer

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[5]*See* Order at 6-7 which discusses the cases cited by AEPCO pertaining to dismissal.

> and hence a rejection . . . Furthermore, if the offeree, though clearly and positively accepting the offer, makes additions or changes which on fair interpretation may be understood not to undercut an otherwise positive acceptance, the courts may properly treat the offeree's response as an acceptance coupled with an offer, rather than as a counteroffer and rejection.

Williston on Contracts §6:16.

There are numerous cases that are in accord. *See, e.g., Alpha Venture/Vantage Properties v. Creative Carton Corp*, 370 N.W.2d 649, 652 (Minn. Ct. App. 1985)("It is well settled that, in order to form a contract, an acceptance must be coextensive with the offer and may not introduce additional terms or conditions. An acceptance which qualifies the terms of the offer is, in essence, a rejection of the offer and is treated as a counteroffer. However, it is equally well settled that requested modifications of the offer will not preclude the formation of a contract where it clearly appears that the offer is positively accepted, regardless of whether the requests are granted."; finding that an acceptance was still valid although it was accompanied by a new statement that a broker fee should be shared and "Your [i.e., the offeror] share of this cost is $1,432.80"); *Krumme v. Westpoint Stevens, Inc.*, 143 F.3d 71, 83-84 (2nd Cir. 1998)("[A]n acceptance must comply with the terms of the offer and be clear, unambiguous and unequivocal . . . A proposal to accept the offer if modified or an acceptance subject to other terms and conditions [is] equivalent to an absolute rejection of the offer . . . However, [i]f the acceptance of an offer is initially unconditional, the fact that it is accompanied with a direction or a request looking to the carrying out of its provisions, but which does not limit or restrict the contract, does not render it ineffectual or give it the character of a counteroffer."; although the offer stated that the discount rate for an employee pension payout was subject to change, and the offeree's acceptance included a statement that he understood the discount payout would be calculated at 5%, the acceptance was held to be valid as the employee's acceptance was not conditioned on the 5% discount rate)(internal quotes and citations omitted); *Stonewood Hotel Corp. v. Davis Development, Inc.*, 447 N.W.2d 286, 290 (N.D. 1989)("[N]ot every new proposal constitutes a qualified acceptance or counteroffer. An acceptance is not necessarily invalidated by proposing changes or additions."; although offeree's "Draft 5" of the contract included changes in

regards to prorating rent and changes in the monthly payment date, the appellate court found that the trial court improperly determined that there was no valid acceptance as the trial court did not consider whether the new proposals by the offeree may have constituted an acceptance not dependent on the offeror's assent); *Pravorne v. McLeod*, 79 Nev. 341, 345-46 (1963)(although offeree's acceptance was coupled with a letter stating that an amendment pertaining to a release clause has been prepared and submitted for offeror's signature and approval, the acceptance was still valid as the court held that this was simply a request for an additional benefit which was not a condition for offeree's acceptance); *Honeywell, Inc. v. American Standards Testing Bureau*, 851 F.2d 652, 659 (3rd Cir. 1988)("[A] reply which suggests changes or additions to the terms of an offer may be either an acceptance or a counteroffer, and the question is for the jury to decide.");*Costello v. Pet Inc.*, 17 Mass.App.Ct. 382, 386 (1984)("[A] request for a modification accompanying an acceptance does not prevent the formation of a contract where it is clear the offeree intended to accept whether or not the modification was accepted."); *Best Foam Fabricators, Inc. v. U.S.*, 38 Fed.Cl. 627, 636 (Fed. Cl. 1997)("It is well settled that [a]n acceptance which requests a change or addition to the terms of the offer is not thereby invalidated unless the acceptance is made to depend on an assent to the changed or added terms.")(internal quotes and citations omitted); *Killam v. G.U. Tenney*, 229 Or. 134, 153 & 155 (1961)(same); *Stout v. Home Life Insurance Co.*, 651 F.Supp. 28, 35 (D. Md. 1986)(same).

In light of the foregoing authority, and taking UP's facts as true and drawing all inferences in UP's favor as required at the motion to dismiss stage of the litigation, the Court finds that UP has stated a claim in regards to Count 1 seeking a declaration that UP and

AEPCO entered into a transportation services contract.[6] Thus, AEPCO's motion to dismiss Count 1 is denied.

Count 3: Good Faith Obligation to Negotiate

Count 3 of UP's Complaint seeks (in the alternative) a declaration that AEPCO has an obligation to negotiate with UP in good faith. AEPCO's motion seeking to dismiss Count 3 is summarily denied as AEPCO's arguments for dismissal as to Count 3 hinged on the Court accepting its primary argument that UP and AEPCO never entered into any transportation services contract. As the Court has found that UP has stated a claim as to the existence of a contract between AEPCO and UP, AEPCO's motion to dismiss as to Count 3 is denied.

Count 2: Common Carrier Rates

Lastly, AEPCO argues that the Court must dismiss Count 2 as the Court has no jurisdiction over this claim which seeks a "judicial declaration that [UP] has no obligation to establish common carrier rates for the transportation of coal from mines in Colorado and the SPRB to Apache Station beginning January 1, 2009." *See* Complaint at ¶25. AEPCO argues that the Court has no jurisdiction to issue the specific judicial declaration urged by UP as the STB has exclusive jurisdiction to determine whether a railroad such as UP must establish common carrier rates and service terms. *See* 49 U.S.C. §10501 ("The jurisdiction

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[6]The Court notes that it need not decide whether the additional terms at issue are material as the Court has found that §61 is applicable under the circumstances of this case. The Court also notes that the materiality of terms is a question of fact that generally is not a proper issue to be resolved pursuant to a motion to dismiss. *See Comark Merchandising, Inc. v. Highland Group, Inc.*, 932 F.2d 1196, 1203 (7th Cir. 1991)("'Material alteration' is a question of fact to be resolved by the circumstances of each particular case."); *Trans-Aire Int'l v. Northern Adhesive Co., Inc.*, 882 F.2d 1254, 1261 (7th Cir. 1989)("Generally, whether an additional term 'materially alters' a contract should not be determined upon a summary judgment motion because the inquiry is merely part of the process to ascertain the parties' bargaining intent."); *Palmer G. Lewis Co., Inc. v. ARCO Chemical Co.*, 904 P.2d 1221, 1229 (AK 1995)("Generally, materiality [of contractual terms] is a question of fact."); *Dorton v. Collins & Aikman Corp.*, 453 F.2d 1161, 1169 n. 8 (6th Cir. 1972)([W]e believe the question of material alteration necessarily rests on the facts of each case."); *N & D Fashions, Inc. v. DHJ Industries, Inc.*, 548 F.2d 722, 726 (8th Cir. 1976)("[W]hether an additional term . . . constitutes a 'material alteration' is a question of fact to be resolved by the circumstances of each particular case.").

of the [STB] over . . . transportation by rail carriers, and the remedies provided in this part with respect to rates . . . [and] services . . . of such carriers . . . is exclusive."); *DeBruce Grain, Inc. v. Union Pacific Railroad Co.*, 149 F.3d 787, 788 (8th Cir. 1998)("In 1995 Congress passed the Interstate Commerce Commission Termination Act under which the STB replaced the Interstate Commerce Commission . . . as the regulatory agency for rail transportation . . . Under 49 U.S.C. § 10501, the STB has broad exclusive jurisdiction over questions of rates, service, tracks, and rail operations . . .").

In response, UP argues that as a railroad is not required to establish common carrier rates for transportation governed by a contract, and questions concerning the existence and scope of transportation contracts have been delegated to the courts, this Court has jurisdiction to issue the declaration at issue if it determines a contract exists as the Court may resolve related disputes pertaining to common carrier rates. *See, e.g.*, 49 C.F.R. §1300.1(c)(stating that the STB's regulations pertaining to rates "do not apply to any transportation or service provided by a rail carrier under contract."); 49 U.S.C. 10709(c)(1)("A contract that is authorized by this section, shall not be subject to this part . . ."); *PSI Energy v. CSX Tranportation, Inc. and Soo Line Railroad Co.*, 1998 WL 608254, *2 (S.T.B. 1998)("It is well established that, where there is a genuine dispute regarding the scope of a railroad transportation contract, the interpretation of which is necessary to resolve essential issues in a railroad rate complaint, we do not interpret the contract ourselves, but instead suspend proceedings in the rate complaint until the contract is interpreted."); *Western Resources, Inc. v. Atchison, Topeka and Santa Fe Railway Co.*, 1996 WL 257677, *3 (S.T.B. 1996)("[Santa Fe Railroad] must comply with any reasonable requests that are not covered by the transportation contract."); *Toledo Edison Co. v. Norfolk & Western Railway Co.*, 367 I.C.C. 869, 873 (I.C.C. 1983)(stating that whether "a contract in fact does or does not exist . . . has been delegated to the Courts by the contract provisions of the Staggers Act. This legislation . . . has been interpreted as clearly expressing Congress' intent to shift rail contract disputes to the courts."); *Kansas Power & Light Co. v. Burlington Northern Railroad Co.*, 740 F.2d 780, 784 (1984)("[T]he Staggers Rail Act [49 U.S.C. 10101 et. seq.] . . . expressly authorizes

rate contracts between shippers and carriers and precludes [STB] review of the reasonableness of rates in authorized contracts, and provides that courts have exclusive jurisdiction to resolve disputes arising under such contracts.").

In reply, AEPCO argues that UP has failed to cite any authority actually establishing that the Court has jurisdiction to grant the specific declaratory relief requested in Count 2. The Court agrees. While the authority cited by UP reflects the undisputed propositions that the STB can not establish common carrier rates as to transportation that is already governed by a rail transportation contract, and that the Court has jurisdiction to address the existence and parameters of an alleged contract, the authority cited does not specifically reflect that the Court has jurisdiction to issue a judicial declaration that a railroad does not have to establish common carrier rates.[7] As such, AEPCO's motion to dismiss Count 2 is granted.

Conclusion

Accordingly, IT IS HEREBY ORDERED as follows:

(1) AEPCO's motion to dismiss (Doc. #13) is denied in part and granted in part as reflected in the text of this Order.

DATED this 25th day of June, 2009.

FRANK R. ZAPATA
United States District Judge

[7]In light of the undisputed propositions referenced by UP, however, it appears that as a practical matter, any final determinations regarding the metes and bounds of any alleged contract in this case would directly impact any related STB proceeding regarding UP's duty to establish common carrier rates. Indeed, the STB cases cited by UP appear to reflect the STB's general practice of holding related administrative proceedings in abeyance until a court proceeding reaches a final determination as to the parameters of any alleged railroad transportation contract.